IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-25-0272

BRUCE DOERING, an individual and KIM DOERING, an individual,

Defendants/Appellants,

v.

SPENCER MELBY, an individual and COLLETTE MELBY, an individual,

Plaintiffs/Appellees,

and

DAWN MADDUX, an individual, WESTERN FRONTIER, LLC d/b/a ENGEL & VÖLKERS WESTERN FRONTIER, a Montana Limited Liability Company;

Co-Defendants/Appellees

APPELLANTS' OPENING BRIEF

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV-21-671; Honorable Judge Jason Marks

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Rules and Statutes

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in granting summary judgment on the Melbys' Breach of Contract Claim where the Parties had not Agreed to final terms of a Contract for Deed, which was critical to the transaction.

STATEMENT OF THE CASE

This action was commenced before the Montana Fourth Judicial District Court, Missoula County (the "District Court") on May 26, 2021. (R@1[1]) After several amendments, on March 19, 2024, the Spencer and Collete Melby (the "Melbys") filed the Fourth Amended and Supplemental Complaint (the "Complaint") against Bruce and Kim Doering (the "Doerings"), Dawn Maddux, and Western Frontier, LLC d/b/a Engle & Völkers Western Frontier (collectively "Engel & Völkers"), a Montana limited liability company, and Janes Does. (R@204). The Melbys asserted a Breach of Contract claim against the Doerings, as well other claims for damages against the Doerings and Engel & Völkers. *Id*.

On January 16, 2024, the Melbys and the Doerings filed cross-Motions for Summary on the issue of liability for the breach of contract claim. (R@134 and 139). The Court heard oral argument on the competing motions for summary judgment on April 24, 2024. (R@221). On April 29, 2024, the District Court entered its *Order Granting Plaintiffs' First Motion for Partial Summary Judgment* (R@224)

[1] Citations to the Record (R@##) refers to the Register of Actions referencing the District Court's Docket Numbers.

(Appendix "A") (the "Summary Judgment Order"). In the Summary Judgment Order, the Court found that an enforceable contract existed, that the Doerings breached that contract by failing to close, and that the Melbys were damaged as a result. *Id*.

On May 24, 2024, the Doerings filed their Motion for Relief Under Rule 54(b)(1). (R@240). On January 29, 2025, the Court issued its *Order Denying Doering for Relief under Rule 54(b)(1)*. (R@265). While the District Court denied the Doerings' Motion for Relief under Rule 54(b)(1), it stated, "Should the Doerings wish to appeal the Order prior to trial, they may do so via the process delineated under the same rule." (R@265, p. 8). Acting on the invitation of the District Court, the Doerings filed their Motion to Direct Entry of Final Judgment (R@270). On March 25, 2025, the District Court entered its *Order Granting Doerings' Motion for Rule 54(b) Certification*. (R@283) (the "Certification Order").

This appeal is taken from the District Court's Summary Judgment Order, which was certified as final under Rule 54(b), M.R.Civ. P. Notice of Appeal (April 11, 2025). On April 22, 2025, this Court issued its Order allowing this appeal to proceed.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The Doerings formerly owned real property located at 5250 Marshall Canyon Road in Missoula County ("Marshall Mountain"). (R@48, ¶34, R@51, ¶34).

Marshall Mountain is comprised of 156 acres outside of Missoula. The Doerings purchased Marshall Mountain in 1993 and possessed it up until its sale in 2021. (R@135, Exh. A, pp. 21-22). While the Doerings owned it, Marshall Mountain had been historically used by the public for recreational purposes. (R@135, Exh. A, pp. 94-95). These activities mostly included mountain biking, skiing, snowmobiling, and hiking by individuals and small, organized groups. (R@135, Exh. A, p.181). The Doerings' occasionally imposed certain conditions on the public's use of the property (e.g., requiring insurance if a bike race was held), but, by and large, it was a very informal understanding. (R@135, Exh. A, pp. 181-84).

It was of the upmost importance to the Doerings that public access be continued after the sale of Marshall Mountain. (R@135, Exh. A, p. 48). The Doerings had never granted a public easement because they did not "think it was necessary"; "people asked permission over the years and if it was consistent with our goals, we allowed it." (R@135, Exh. A, pp. 75, 95). The Doerings preferred that Marshall Mountain eventually end up in public ownership. (R@135, Exh. A, p. 250).

In 2018, the Doerings listed the Marshall Mountain for sale with Dawn Maddux of Engel & Völkers. (R@135, Exh. A, p. 93). In February 2021, Spencer Melby ("Dr. Melby") obtained employment with Providence Health and the Melbys set out to find a home in Missoula. (R@135, Exh. B, pp. 9, 25-26). The Melbys viewed Marshall Mountain several times and were aware that Marshall Mountain

had a long history of public-access use for recreational purposes. (R@135, Exh. B, pp. 64-67). Dr. Melby "met with and talked with several groups that used the property and had been using it for some time." (R@135, Exh. B, p. 64). Dr. Melby was aware within the community that "there was a sentiment to keep the status quo so [the public] could continue using it as the Doerings had allowed." (R@135, Exh. B, p. 74).

Ultimately, on February 22, 2021, the Doerings and Melbys entered into the Buy-Sell Agreement ("Buy-Sell"). (R@135, Exh. C, 1:4) (Appendix "B"). The terms of the Buy-Sell provided that the Melbys would purchase Marshall Mountain for $2,150,000 through conventional financing. (Appx. "B", 1:41-50). The Buy-Sell provided a closing date of June 4, 2021, subject to a series of contingencies. (Appx. "B", p. 1-2). One contingency was the "Financing Contingency" which provided that "[t]his Agreement is contingent upon Buyer obtaining the financing specified in the section of this Agreement entitled 'PURCHASE PRICE AND TERMS.' If financing cannot be obtained by the Closing Date this Agreement is terminated and the earnest money will be refunded to the Buyer." (Appx. "B", p. 4:176-79).

Following execution of the Buy-Sell, the Melbys communicated they were unable to secure conventional financing. (R@135, Exh. B, p. 80). With the Melbys unable to obtain conventional financing, the Melbys and Doerings discussed possible seller financing through a contract for deed. (R@48, ¶54, R@51, ¶54). The

parties agreed that the use of a contract for deed was acceptable. (R@48, ¶56, R@51, ¶56). On May 3, 2021, the Doerings and Melbys entered into the Amendment to Agreement Between Parties for Existing Terms and Conditions ("Amendment"). The Amendment states, in relevant part:

> Seller shall offer seller financing with contract for deed with the following terms: 20% downpayment, 6% interest amortized over 25 years with ballo[o]n payment/payoff due in 7 years from closing. There is no pre-payment penalty. Buyer shall pay cost of writing contract for deed, seller shall pay opening escrow fees, buyer shall pay monthly escrow fees. Parties shall mutually agree upon long term escrow agency if Western Title and Escrow cannot provide escrow services. **Final contract for deed to be mutually agreed upon by both parties.**

(R@135, Exh. D, ln. 29) (Appendix "C") (emphasis added).

After execution of the Amendment, the parties mutually retained attorney, Zane Sullivan, to draft the contract for deed contemplated by the Amendment. (R@48, ¶62, R@51, ¶62). On May 8, 2021, JR Casillas, attorney for the Doerings, ("Doering's Attorney") reviewed and redlined the first draft of the contract for deed that Mr. Sullivan had drafted. (R@48, ¶66, R@51, ¶66).

On May 10, 2021, while drafting of initial contract for deed was ongoing, Mr. Doering's Realtor, Ms. Maddux, discussed third parties who might present a backup offer on Marshall Mountain. (R@48, ¶67, R@51, ¶67). Ms. Maddux asked Mr. Doering how committed he was to the Melbys. Id. Mr. Doering stated that the Melbys had put time and money into the property and that, "We aren't going to pressure the buyers out. They have acted in good faith." *Id*. On May 11, 2021,

Richard Wishcamper submitted a backup offer to the Doerings, offering to purchase Marshall Mountain for $2,160,000—just $10,000 more than what the Melbys were offering. (R@129, Exh. O). The Melbys were made aware of Mr. Wishcamper's backup offer on the day it was made. (R@48, ¶68, R@51, ¶68). It was disclosed that Wishcamper's interest in Marshall Mountain was on behalf of the public interest.

Mr. Doering began to suspect that the Melbys might not be as open to allowing public access as they had initially discussed, even going so far as to use the words "bad faith" when referring to certain "off-the-cuff" remarks made by Dr. Melby. (R@135, Exh. A, pp. 226-227). These comments included: Dr. Melby's intention to move a long-established gate farther to the south that would, according to Mr. Doering, "screw up the availability of parking in the wide spot where historically for seven decades people parked," and removing all Marshall Mountain signs. (R@135, Exh. A, pp. 227-228). It was at this point that Mr. Doering said that they "no longer felt comfortable having [the Melbys] without an expressed easement to protect the public." (R@135, Exh. A, p. 228).

On May 18, 2021, Mr. Casillas prepared a revised contract for deed for the Melbys' consideration. (R@129, Exh. R) (Appendix "D"). Mr. Casillas' revised contract for deed included 24 new provisions which were not addressed in the Buy-Sell Agreement or Amendment. (R@241, Exh. A; See also Appx. "D"). For instance, the revised contract for deed contemplated that the Melbys could create a limited

liability agreement to hold title—which required Mr. Casillas to include a personal guaranty. (Appx. "D", pp. 1, 19-21). The revised contract for deed also included provisions relating to improvements and restoration of the property, insurance on improvements on the property, default provisions and rights to cure, as well as general and environmental indemnification provisions. *Id*. These provisions were not required if the Melbys had obtained financing and received a deed from Doerings. The revised contract for deed also included a provision that the contract for deed would supersede all prior agreements:

> The parties mutually agree that this Contract supersedes any and all other written or verbal agreements pertaining to this transaction, and the terms and provisions of the transaction are as specified herein, and that neither Seller no Buyers are relying upon any agreed performance or action of the other outside the terms and provisions of this contract in entering into this Contract.

(Appx. "D", p. 17). Further, the revised draft also included a public access provision that permitted use of Marshall Mountain "by Zootown Derailers, the Interscholastic Cycling Association, MT Alpha Cycling, MTB Missoula, and MTCX for practice, races, and other hosted events." (R@135, Exh. B, p. 117).

The Doerings directed their attorney to draft a public access easement into the contract for deed to protect their interest for the public. (R@135, Exh. A, p. 250). On May 21, 2021, prior to any response from the Melbys as to the revised contract for deed, Doering's attorney sent several additional changes relating to public access

and forest fires. (R@129, Exh. S) (Appendix "E"). The Public Access provision provided in relevant part:

> Due to the historic use of the property by the public, sellers are granting the following listed groups, which includes but is not limited to, Zootown Derailleurs, the National Interscholastic Cycling Association, MT Alpha Cycling, MTB Missoula, and MTCX for practice, races and other hosted events, an easement for any part of the 156 acres. This easement may be rescinded by sellers at anytime during the life of this contract.

(Appx. "E").

Upon reviewing these proposed revisions, the Melbys engaged attorney Del Post ("Melby's attorney") to also review the revised contract for deed. (R@48, ¶95, R@51, ¶95). On May 21, 2021, Melby's attorney called Doering's attorney and informed him that, although the Melbys were not happy with some of the changes, they would agree to most of them, with a few careful edits. (R@48, ¶95, R@51, ¶95). However, the Melbys pushed back to the Doerings' request to protect the rights of the public and certain organizations, instead offering to allow limited use subject to their discretion. (R@129, Exh. T, p.1) (Appendix "F") The Melbys made numerous proposed changes to the revised contract for deed, which were identified in "blue" on a draft tracking the proposed changes. (Appx. "F", p. 3-25). In one of the proposed changes, the Melbys asked the Doerings to represent that to the best of their knowledge that the prior historical and public use and recreation "has not resulted in any accrual or acquisition of any easement or legal interest in the real

property by any person or entity under the doctrines of prescription, implication, necessity or otherwise." (Appx. "F", p. 8 of 25). Despite disagreeing with some of the proposed terms, including the public access easement, they sent the draft back to and indicated his willingness to continue negotiating and moving the transaction "in the right direction." (R@135, Exh. B, p. 119).

On May 22, 2021, the Doerings, through their attorney, informed the Melbys that they had "decided to reject the proposed revisions and not to make any counterproposals." (R@48, ¶110, R@51, ¶110). Further, their attorney informed the Melbys that the Doerings were terminating "the parties' Buy-Sell Agreement, any applicable Amendments and/or Addendums thereto, and the transaction as a whole." (R@48, ¶110, R@51, ¶110). Mr. Doering stated that his reason for termination was that, based on the remarks Dr. Melby had made about what the Melbys intended to do with Marshall Mountain, "we saw that [the deal with the Melbys] wasn't going to fulfill Marshall's mission." (R@135, Exh. A, pp. 302-303).

On May 24, 2021, after the Contract for Deed negotiations had broken down, the Melbys' counsel sent the Doerings' counsel a letter stating:

> Please be advised my clients do not accept your clients' "termination" of the Buy/Sell Agreement. Your client does not have a legal basis to terminate. My clients have secured alternative financing and are ready to proceed to closing. Please be advised that **my client stands ready, willing and able to close this transaction and will be prepared to do so on June 4, 2021, the day of closing.**

(R@139, Exh. 18). The Melbys filed their initial Complaint on May 26, 2021, which was only against the Doerings, seeking specific performance. (R@1). On June 2, 2021, the Melbys filed their First Amended and Supplemental Complaint, withdrawing their request for specific performance and, instead, seeking monetary relief. (R@7).

STANDARD OF REVIEW

The Supreme Court reviews *de novo* a district court's grant of summary judgment. *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, 191 P.3d 389. "A *de novo* review affords no deference to the district court's decision and [this Court] independently reviews the record, using the same criteria used by the district court." *Siebken v. Voderberg*, 2012 MT 291, ¶¶ 16, 20, 367 Mont. 344, 291 P.3d 572. Thus, the Court must review the evidence in the light most favorable to the party opposing summary judgment and draw all reasonable inferences in favor of the party opposing summary judgment. *Modroo*, ¶ 19.

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment to the Melbys on their breach of contract claim. In the District Court's ruling, it correctly concluded that a contract for the sale of real property existed between the Doerings and the Melbys from the date the Buy-Sell Agreement was fully executed on February 17, 2021 to the date the Amendment to the Buy-Sell Agreement was entered on May 7, 2021. However, when the Melbys requested seller financing, the parties through their

words, actions, and negotiations recognized that an enforceable contract mandated that a contract for deed must be agreed upon. The terms of the transaction, as amended, provided for non-conventional financing and without a contract for deed stating all necessary terms and conditions, neither the Doerings nor the Melbys were protected.

The District Court's ruling, effectively, is that there are no material terms of a contract for the sale of real property other than the parties, the subject matter, a description of the property, the purchase price, and an indication of mutual assent. Effectively, the District Court ruled that no Contract for Deed was necessary. The District Court's conclusion ignores the realities of seller financing through a contract for deed, where the Doerings retain ownership of the property after closing and therefore must include material terms in order to protect themselves, as opposed to a traditional buy-sell agreement where ownership is transferred at closing. Likewise, the Melbys would not take ownership of the property as of the day of closing and therefore required their own set of protections to address this reality. The switch from a purchase and sale under traditional financing to seller financing requiring the use of a contract for deed fundamentally and materially changed the nature of the transaction.

The District Court erred in concluding that there was an enforceable contract and that a mutually agreed upon Contract for Deed was not required, and therefore,

the Doerings breached such contract by not closing on the transaction. Moreover, where there is no enforceable contract because a contract for deed was not agreed upon, the District Court further erred in not granting the Doerings summary judgment on the Melbys' breach of contract claim against them.

ARGUMENT

I. The District Court Erred in Granting Summary Judgment to the Melbys on their Breach of Contract Claim Where There Was No Enforceable Contract.

"To be enforceable, a contract must contain four essential elements: 1) identifiable parties capable of contracting; 2) consent between the parties; 3) a lawful object; and 4) consideration." *Jarussi v. Sandra L Farber Trust*, 2019 MT 181, ¶ 17, 396 Mont. 488, 445 P.3d 1226. The existence of a contract is a question of law. *Murphy v. Home Depot*, 2012 MT 23, ¶ 6, 364 Mont. 27, 270 P.3d 72; see also M.C.A. § 28-2-102. Here, consent is lacking as a contract for deed could not be agreed upon.

A. The Parties Did Not Consent to All Essential Terms to Form an Enforceable Contract.

The District Court erred in concluding that the Doerings and the Melbys had mutually consented to the Buy-Sell Agreement, as amended by the Amendment, and that no contract for deed was required. In its flawed analysis, the District Court concluded, "[B]oth parties consented as evidenced by their various initials and signatures, to the same thing: to modify the Agreement from conditional financing

to seller financing with a contract of deed, with the final terms of the contract for deed to be mutually agreed upon in the future." (Appx. "A", p. 15). The District Court's conclusion is contradictory and contrary to applicable Montana law.

To form a binding contract, there must be mutual consent on all essential terms. *Kortum-Managham v. Herbergers*, 2009 MT 79, ¶ 18, 349 Mont. 475, 204 P.3d 693; *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, 396 Mont. 488, 445 P.3d 1226. "Consent must be mutual, and the parties must agree upon the same thing, in the same sense." *AAA Constr. of Missoula, LLC v. Choice Land Corp.*, 2011 MT 262, ¶ 18, 362 Mont. 264, 264 P.3d 709 (citing *Zier v. Lewis*, 2009 MT 266, ¶ 19, 352 Mont. 76, 218 P.3d 465.

Nothing must be left to conjecture or surmise, or be so vague as to make it impossible for the court to glean the intent of the parties from the instrument, or the acts sought to be enforced." *Steen v. Rustad*, 132 Mont. 96, 106, 313 P.2d 1014, 1020 (1957). "An agreement that requires the parties to agree to material terms in the future is not an enforceable agreement." *GRB Farm v. Christman Ranch, Inc.*, 2005 MT 59, ¶ 11, 326 Mont. 236, 108 P.3d 507. Thus, while the enforceability of a contract does not depend on the inclusion of matters which are subsidiary or collateral, the contract must contain those essential terms "central to the very performance of the contract." *Patton v. Madison County*, 265 Mont. 362, 368, 877 P.2d 993, 996 (1994).

Here, the District Court concluded that the Doerings and the Melbys had consented to the modified structure of the transaction and that alone was sufficient to satisfy the essential element of mutual consent to form a contract. However, in the same breath, the District Court further recognized that Buy-Sell Agreement, as amended, explicitly required a "Final contract for deed to be mutually agreed upon by both parties." The plain language agreed to by the parties recognizes that a future contract for deed is "to be" mutually agreed upon at some future time. Under well-established Montana law, the agreement to agree contemplated in the parties' Amendment does create an enforceable contract. *GRB Farm,* ¶ 11

The District Court attempts to resolve this apparent inconsistency by suggesting that the contract for deed was not a material term to the transaction. As discussed below in greater detail, this argument also falls short where the contract for deed was "central to the very performance of the contract." *Patton*, 265 Mont at 368, 877 P.2d at 996. The importance of the contract for deed is evidenced by the back-and-forth negotiation between Doering's attorney and Melby's attorney as to the terms. The fact that the Melbys accepted many of the proposed changes, while rejecting others, and proposing their own additional changes demonstrates that the parties had not agreed to the final terms of the contract for deed, and there was no consent to form a valid and enforceable contract. Accordingly, where there was no mutual consent, the Doerings were entitled to reject the Melbys' proposed changes

and terminate the transaction.

B. The Contract for Deed was an essential term which was central to the agreement, and because it was not agreed to, the Doerings were entitled to terminate.

i. *The Contract for Deed fundamentally changed the transaction and is therefore material*.

In its Summary Judgment Order, the District Court concluded that a contract for deed was not a material term simply because it was not within the list of "material terms" identified in *Olsen v. Johnston*, 2013 MT 25, ¶ 20, 368 Mont. 247, 301 P.3d 791. Summary Judgment Order, p. 16. In *Olsen*, the Court held, "The material terms of a contract for the sale of real property will include the parties, the subject matter, a reasonably certain description of the property affected, the purchase price or the criteria for determining the purchase price, and some indication of mutual assent." *Olsen*, ¶ 20. Respectfully, this Court's holding in *Olsen* does not stand for the proposition that the only material terms in a contract for the sale of real property are limited to those specified in the Amendment.

The *Olsen* case, as well as the other cases relied on by the District Court, all relate to whether the terms of an *existing*, incomplete agreement were sufficient to be enforceable. Conversely, in this case, the parties restructure, made at Melby's request, required that a completely *new* contract be mutually agreed upon. What could be more material than the recognition that a new contract must be entered? Under the initial Buy-Sell Agreement, the Melbys contemplated conventional

financing. The transaction would close by the Melbys delivering money to the title company, the Doerings delivering a deed, the money would be exchanged for the deed, which would be recorded and the Melbys would own the property. The entire relationship between the Doerings and the Melbys would end at closing.

A contract for deed is a more complex transaction as the relationship does not end at closing. The Doerings would hold legal title to Marshall Mountain until the entire purchase price is paid. As such, the Doerings required protections that determined how the Melbys could and could not use the property. In addition, the Doerings needed provisions that allows them to exercise certain remedies in the event of the Melbys' failure to make payment, or some other event of default. In other words, the Doerings needed assurances that although the Melbys were taking possession of the property at closing that nothing would affect the condition of the property, the condition of title or their right to recover ownership, if necessary.

Likewise, the purchase and sale of the property through a contract for deed also created concerns for the Melbys that would not otherwise exist under a traditional financing arrangement. The Melbys needed protections that until the purchase price was paid in full they would have possession of the property, they needed contractual commitments as to what constituted a default and how a default could be cured if one existed. The Melbys also needed assurances that if the contract price was paid in full that a deed, to be placed in escrow, would allow them to obtain

and record the deed without further involvement of the Doerings. Neither the Doerings' nor the Melbys' unique set of concerns would exist if the title was transferred at the time of closing under a traditional financing arrangement.

ii. *The Contract for Deed was a material condition of the transaction*.

As this Court has recognized, the material terms of each contract depend on the nature of the contract itself: "[l]ittle might be needed in a simple pay and take agreement; and much in a more involved transaction and agreement." *Dineen v. Sullivan*, 123 Mont. 195, 198, 213 P.2d 241, 242 (1949). This transaction materially changed from a straight-forward cash deal where the Melbys would own the property upon closing (a "pay-and-take" agreement) to an installment payment deal which deferred the transfer of ownership until the purchase price was paid in full, requiring additional terms to protect the parties.

Here, the terms of the Contract for Deed were material to the transaction. Doering's attorney prepared a revised contract for deed for the Melbys' consideration. The revised contract for deed included twenty-four (24) provisions that were not addressed by the Buy-Sell Agreement or Amendment. (Appx. "D" and "E"). Those provisions that Doering's attorney felt necessary for the protection of his clients included, but are not limited to, the following:

- The inclusion of a personal guaranty, where the Buy-Sell Agreement contemplated that the Melbys, could within their rights, create a Montana limited liability company to hold title to Marshall Mountain. (Appx. "D", pp. 1, 19-21).

- A provision that restricted the Melbys from incurring any further indebtedness that could compromise their ability to repay the obligation to the Doerings. (Appx. "D", pp. 3-4).

- A provision that required the Melbys to maintain the property in good repair, including, a "CTEC Triple Chair Lift,' which required "annual inspection and maintenance by a qualified professional to ensure compliance with the Technical Standards and Safety Act[.]" (Appx. "D", p. 4).

- A public access easement in which the Doerings granted an easement for use of the 156 acres to the Zootown Derailleurs, the National Interscholastic Cycling Association, MT Alpha Cycling, MTB Missoula, and MTCX for practice, races, and other hosted events. (Appx. "E", p. 2).

- An inspection provision that permitted the Doerings to inspect the property at reasonable times. (Appx. "D", p. 6).

- An escrow agent provision that clarified that the Melbys were only entitled to delivery of the deed to the property upon the condition that the Melbys have made all payments. This provision further clarified that if Melbys were to default in the performance and have not cured such default, the Doerings had the right to declare the contract terminated and to recover the deed from the escrow agent. (Appx. "D", p. 8).

- A provision requiring the Melbys to follow all city, county, and state recommendations and laws related to burning on the property to prevent forest fires. (Appx. "E", p. 2).

- General/Environmental Indemnification provisions that required the Melbys to indemnify and hold the Doerings harmless from any claims, losses, liabilities, damages, or expenses arising from the Melbys' possession of Marshall Mountain. (Appx. "D", pp. 11-16).

A comprehensive comparison of provisions between the Buy-Sell Agreement, as

amended, and the proposed Contract for Deed demonstrates the differences. (R@241, Exh. "A") (Appendix "G").

In response to Doering's attorney proposed revisions to the Contract for Deed, Melby's attorney similarly made numerous revisions to the draft of the Contract for Deed that he believed were necessary for the protection of his clients, the Melbys. (Appx. "F"). In total, Mr. Post made eighty-seven (87) distinct revisions to the proposed Contract for Deed. Having been requested by the Doerings to protect the rights of the public and certain organizations' use of Marshall Mountain, the Melbys pushed back, offering to allow limited, discretionary use. The Melbys went further and asked the Doerings to represent to the best of their knowledge that the prior and historical and public use and recreation "has not resulted in any accrual or acquisition of any easement or legal interest in the real property by any person or entity under the doctrines of prescription, implication, necessity or otherwise." (Appx. "F", pp. 6-7).

Clearly, the parties proposed revisions to the Contract for Deed related to substantive issues that the parties' respective counsel felt were necessary to protect their clients. These were not perfunctory changes that could be determined by the Court. The parties and their counsel recognized the materiality of the Contract for Deed. In fact, the Contract for Deed included a specific provision that the Contract for Deed would supersede all prior agreements:

> The parties mutually agree that his Contract supersedes any and all other written or verbal agreements pertaining to this transaction, and the terms and provisions of the transaction are as specified herein, and that neither Seller nor Buyers are relying upon any agreed performance or action of the other outside the terms and provisions of this contract in entering into this Contract.

(Appx. "D" and "F"). Neither Doering's attorney nor Melby's attorney proposed any changes to this provision, and it was accepted as written without modification. (Appx. "D" and "F"). Despite the parties' recognition of the materiality of the Contract for Deed, the District Court did not even consider the Contract for Deed because it relied solely on the *Olsen* Court's definition of "material terms."

The District Court also erred in adopting the Melbys' reliance on *Hurly v. Lake Cabin Dev., LLC*, 364 Mont. 425, 276 P.3d 854 (2012), equating the specifications of real estate improvements to a contract for deed. In *Hurly*, a developer entered into a contract to purchase properties from Robert Hurly, which required a $450,000 payment at closing and the developer's commitment to construct two single family homes and two duplex rental homes for Hurly. The developer failed to obtain government approval for the development and, consequently, Hurly sought specific performance. The developer argued there was no enforceable contract because the specifications of the improvements had not been agreed upon. The Court disagreed. The Court noted that the contract provided certain specifications (square footage, number of beds, bathrooms, garages, etc.), and that any other terms were "ascertainable," and that "there were clear and definite

parameters for determining the purchase price." Based on these facts, the Court held that the contract included all essential material terms and was an enforceable contract. *Hurly,* ¶¶ 20-22.

The *Hurly* decision, which depended on whether the already-written terms were sufficient to ascertain the entire contract, is not analogous with the facts of this case. In this case, as acknowledged by the attorneys, the Contract for Deed would supersede "any and all other written or verbal agreements pertaining to this transaction." In *Hurly*, there was no need for a contract to replace the prior contract as there were clear and definite parameters of what the developer had agreed to tender. Here, there is an agreement to replace all prior agreements. The Contract for Deed was not some perfunctory term which the District Court could determine and add in later, as the obligations were not clearly ascertainable.

The facts of this case are similar to those in *Snyder v. Miniver*, 134 Idaho 585, 6 P.3d 835 (2000), where an Idaho court held that a contract was not enforceable where the parties could not agree to the terms to a contract for deed to be subsequently drafted and agreed to. In *Snyder*, the parties entered into an earnest money agreement ("EMA") for the purchase and sale of real property, which required the parties to agree to a future contract for deed. *Id*., 134 Idaho at 586, 6 P.3d at 836. The seller prepared a draft contract for deed which, in addition to escrow, payment and security terms, included obligations and restrictions relating to a power

line easement and the cutting of trees on the property. *Id*., 134 Idaho at 587, 6 P.3d at 837. The additional terms were not acceptable to the buyers, so the buyers proposed their own changes to the contract for deed. When the seller refused to sign, the buyers sought specific performance and damages. *Id*.

The *Snyder* Court affirmed summary judgment for the sellers by finding that the agreement was not enforceable. Although the EMA provided the purchase price, the interest rate, the term, the installments, and the amount of the balloon payment, the EMA provided no measure of security to the seller for the sale of their land. The Court recognized, "[t]his case does not involve the simple sale and purchase of a small piece of real estate. The instant transaction has many levels of complexity." *Id*., 134 Idaho at 588, 6 P.3d at 838. The Court reasoned, "[t]he parties contemplated from the beginning that there would be a subsequent contract for deed to address additional financial and security terms." *Id*., 134 Idaho at 589, 6 P.3d at 839. Ultimately, the Court concluded that the EMA was not enforceable because it was not sufficiently certain and definite in all of its essential terms and, therefore, the sellers were entitled to summary judgment.

Although decided under Idaho law, *Snyder* is persuasive where Idaho law aligns with Montana law. The *Snyder* Court recognized that the preliminary agreement "was not specifically enforceable because it was not sufficiently certain and definite in all of its essential terms." *Id*., 134 Idaho at 589-90, 6 P.3d at 839-40.

This decision would hold true under Montana law as well. As this Court recognized in *Keesun Partners*, "the purported contract fail[ed] for lack of consent because although some of the terms of the [contract] may have been agreed upon, the record indicated that the parties were involved in an ongoing negotiation process regarding many essential terms of the contract and no finalized agreement was ever reached. *Keesun Partners*, 249 Mont. at 337, 816 P.2d at 421.

iii. *The negotiation between the Doerings and the Melbys demonstrates that the terms of the Contract for Deed were material to the transaction and that the parties had not mutually consented*.

The District Court failed to recognize the significance of the parties' ongoing negotiations in demonstrating the essential element of consent. The negotiations between the Doerings and the Melbys demonstrates that the terms were material to the transaction and that the parties had not agreed "upon the same thing, in the same sense." *AAA Constr. of Missoula, LLC*, ¶ 18.

Consent is not determined by the parties' subjective, undisclosed intent, but by their objective manifestations of consent. *Olsen v. Johnston*, 2013 MT 25, ¶¶ 11, 16, 368 Mont. 247, 301 P.3d 791. A "purported contract fails for lack of consent" where "although some of the terms of the [contract] may have been agreed upon," the record indicated that "the parties were involved in an ongoing negotiation process regarding many essential terms of the contract and no finalized agreement was ever reached." *Keesun Partners v. Ferdig Oil Co.*, 249 Mont. 331, 337, 816 P.2d

417, 421 (1991).

In *Patton*, the Court stated that "the intention of the parties, made clear on the record, was that the final settlement documents and covenants [....] would not be effective until signed" and held that, as a result, neither the offer nor acceptance was unconditional. *Id.* at 367, 877 P.2d at 996. The evidence established that the plaintiffs' attorney added restrictions to a list of already amended covenants, while defendants' counsel also provided another set of amendments and responded with a letter stating that further discussion would be appreciated. *Id*. 877 P.2d at 996. The Court reasoned that "[t]hese activities are not those of two parties who have had a 'meeting of the minds.' The matters still at issue were not 'subsidiary,' or 'collateral,' they were central to the very performance of the contract." *Id*. The Court held there was no meeting of the minds and, thus, no binding agreement because "[t]he terms of the covenant were the essential matters at issue," which "could only have been drafted and approved by the parties" and could not "easily have been settled by the court's ruling." *Id*.

Here, like *Patton*, the continued negotiations establish the parties' and their respective attorneys' recognition that the Contract for Deed must be mutually agreed upon as a condition of the Amendment. Doering's attorney drafted the first Contract for Deed to begin negotiations with Melbys and forwarded it to Melby's attorney, on May 18, 2021. Appx. "D". Three days later, Doering's attorney provided

additional language for Melbys and Mr. Post to consider. Appx. "E".

The Melbys recognized the importance of the Contract for Deed. As recalled by Melby's attorney, Dr. Melby "asked me to make as limited revisions as I possibly could live with so that we could make the contract for deed work and keep the transaction alive. . . He said, 'Do what you got to do to, you know, satisfy your concerns and make it work, 'cause I want – I – I don't want to lose this property, I don't want to lose this transaction.'" (R@129, Exh. U, p. 11). Dr. Melby's comments to his attorney, demonstrate that he understood two critical conclusions. First, Dr. Melby understood that the parties' mutual agreement addressing all material issues to the terms of the Contract for Deed was necessary for the transaction to continue. Second, Dr. Melby further understood that a mutual agreement had not been reached. Indeed, as Dr. Melby acknowledged, he was working to keep the "transaction alive" and did not "want to lose this transaction." If Dr. Melby believed an enforceable agreement had been reached, his comments would have been superfluous.

Melby's attorney not only responded to the Doerings' draft Contract for Deed, but his email attaching the Melbys' counteroffer back to the Doerings shows the importance of mutually agreeing on the terms of a Contract for Deed. "[M]y client is trying to do everything he can to make this transaction work and so like I said he will agree to most of the additions." Appx. "F", p. 1 of 25. In closing, Melby's attorney indicated that "I look forward to speaking with you further to keep this

transaction moving in the right direction." *Id.* The mere fact that negotiations were ongoing demonstrates the parties' recognition that the terms of the contract for deed were material and not yet agreed to. If the terms within the contract for deed were not material, Melby's attorney and his clients simply could have responded that the proposed terms were unnecessary. However, Melby's attorney clearly recognized the critical importance of agreeing to the terms of the Contract for Deed.

Melby's attorney proposed changes to the Contract for Deed is further evidence of the parties' recognition that the terms of the Contract for Deed were material. Melby's attorney made what he described as "surgical changes," which included adding the word "material" seven times to the Contract for Deed. Appx. "F", pp. 3-25. Mr. Post clearly recognized the "materiality" of these provisions within the Contract for Deed, let alone the Contract for Deed itself.

The District Court failed to recognize the significance of the parties' ongoing negotiation of terms to the Contract for Deed and erred in concluding that the parties had mutually agreed to all material terms of the transaction.

C. *Steen* does not conflict with the cases cited by the Doerings that terms central to the contract—whether or not they are related to performance—are material.

In the Summary Judgment Order, the District Court spends significant time and effort analyzing what it believes to be a discrepancy between the Doerings' reliance on *Patton, supra.* and the language of *Steen, supra*. Summary Judgment

Order, pp. 19-24. In *Steen*, the Court held that matters are not "essential" if they are "merely subsidiary, collateral, or which go to the performance of the contract[.]" 132 Mont. 96, 106, 313 P.2d 1014, 1020. Conversely, the *Patton* Court stated, "the matters still at issue were not 'subsidiary,' or 'collateral,' they were central to the very performance of the contract. *Patton*, 265 Mont. at 367, 877 P.2d at 996 (citing *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 400, 849 P.2d 1039, 1043 (1993)). The District Court held, the "mutual agreement on final terms in the contract for deed is a matter that goes to the performance of the Agreement as amended; thus, under *Steen* and its progeny, it is a non-essential matter. Appx. "A", p. 24.

Respectfully, *Steen* does not stand for a categorical rule that if a term goes to the performance of a contract, it cannot be essential; only those which *merely* go to performance are non-essential. This is evident in the cases *Steen* cites. In *Long v. Needham*, 37 Mont. 408, 96 P. 731 (1908), the parties' written telegrams disputed whether the transaction would go through Fergus County Bank or First National Bank of Lewistown. The Court held, "But this suggestion has to do with the matter of performance, rather than with the creation of the contract. It is not an element of the contract at all." *Long*, 37 Mont. at 420, 96 P. at 734. In *Johnson v. Elliot*, 123 Mont. 597, 605, 218 P.2d 703, 707 (1950), the Court held that the power of attorney did not specify the time within which the purchase price was to be paid, but because the term could be filled in by statute, it was not essential. In *Lewis v. Aronow*, 77

Mont. 348, 357, 251 P. 146, 149 (1926), the Court held the general statement of the place of delivery was sufficient even though it did not describe the precise location of the goods because "all the details or particulars" of the oral contract need not be stated in the writing.

In each of these cases citing the *Steen* Court, the terms at issue were not material or essential because they *merely* related to the performance of the contract, *i.e.* that the essential terms were already agreed upon, and the matter at issue only dealt with how to perform those agreed upon terms. Here, however, the Contract for Deed goes well beyond terms that can be provided by statute and are clearly more substantial than those set forth in the cases *Steen* relied upon.

Steen also cites *Dineen v. Sullivan*, which is relevant to this case. In *Dineen*, the Court affirmed the dismissal of a breach of contract claim because the memorandum did not include all essential terms of the contract. The memorandum contained the following material terms: the parties, a general description of the property, the price, earnest money, the date of the first installment, and that a warranty deed would be drafted "embodying the terms agreed upon by the seller and the purchaser." *Id.* at 199. It then listed the terms which were <u>not</u> included in the memorandum: the amount of the first installment, that the balance was to be made in eleven annual installments with interest at 5% per annum, the date possession was to be transferred to the purchaser, that taxes would be prorated, that purchasers

would keep the property insured, and most importantly, that the warranty deed would be delivered after the first installment and the purchaser would execute a mortgage as security for the balance. *Id.* at 199-200.

The Court affirmed the dismissal, holding that the memorandum did not include all material terms, specifically finding there was nothing in the memorandum relating to the mortgage "which could well or ill protect defendant's stake" in the property until the balance was paid off. *Id.* at 200. There was also nothing to state whether the warranty deed was to be delivered after the first installment or kept in escrow until the balance was paid after eleven years. The essential terms could not be determined from the writing and therefore it was unenforceable. *Id.* at 205.

Dineen cited to an Indiana case which is instructive here: "While the time and place of performance are not always necessary terms of a valid memorandum, because in their absence the law supplies these by implication, but where a time for performance has been expressly agreed upon as a part of the contract and thus made a condition, it must appear as a constituent party of the memorandum." *Id.* at 202 (citing *Block v. Sherman*, 34 N.E.2d 951, 955 (Ind. 1941).

The *Steen* Court cited *Dineen* multiple times and was familiar with its holding. The cases where the terms were found non-essential could either be supplied by statute or did not reasonably affect the transaction (*e.g.* using one bank over another).

Whether a term relating to performance is material depends on the contract. For example, if A agrees to mow B's lawn, there may be matters relating to performance which are not material (*e.g.* what kind of mower A uses, when it has to be completed, how A will be paid, etc.). But if B requires the lawn to be mowed by a certain date, that is a material term even though it is directly related to performance. Put another way, if A mows the lawn after that date, he is in breach of a material term.

Patton and *Steen* can be read in harmony. In *Patton*, the matter at issue did not "merely" go to performance—it was "central to the very performance of the contract" and was therefore essential. 265 Mont. at 367, 877 P.2d at 996. In *Olsen v. Johnston*, because the offer did not limit Olsen's modes of acceptance, any reasonable manner of acceptance was satisfactory as a matter of law. Thus, any dispute as to how acceptance could occur was not material. 2013 MT 25, ¶¶ 14-15, 22, 368 Mont. 347, 301 P.3d 791. Notably, *Olsen* inadvertently omits the word "merely" from its definition of non-essential terms, thereby departing from the ruling and reasoning of *Steen*. *Id.* ¶ 21.

Steen correctly holds that a matter which merely relates to performance is not a material term. Thus, *Steen* and its progeny cannot stand for a categorical rule that a term relating to performance is not essential. These cases "rest upon their own peculiar facts and circumstances," and are not to be "guided by any one case, but

rather [interpreted] in light of the many cases which have already been decided." *Id.* at 106-07, 313 P.2d at 1020. Here, the Contract for Deed to be agreed upon was not merely related to the performance of the Buy-Sell Agreement, it materially changes the obligations of the parties in a way which goes beyond performance. The multiple terms of a contract for deed cannot be non-essential terms. The best evidence of this is the drafts of the Contract for Deed prepared by the parties attorneys. Neither attorney believed that provisions in the contract being negotiated were not essential. The District Court erred in categorically ruling that if a term goes to the performance of a contract, it cannot be essential. The District Court also erred when it concluded that the terms to negotiate went only to performance.

D. Attorneys involved in the transaction consistently agree that the terms of a mutually agreed Contract for Deed was essential to the transaction.

After the parties executed the Amendment, three attorneys were involved in drafting the Contract for Deed. Initially, Zane Sullivan, an attorney that represented both parties drafted a Contract for Deed. The Contract was referred to Doering's attorney who prepared a contract acceptable to Doerings, importantly requesting assurances for the public access to Marshall Mountain. The contract was sent to Melby's attorney, who responded with changes acceptable to Melby, critically not agreeing to an easement for public access and use. Each of these attorneys recognized that agreeing to the terms of a Contract for Deed was required to form a binding contract.

With respect to Zane Sullivan, his qualifications are well known in Montana. They were summarized by Matt Rosbarsky, Melbys' real estate agent. He testified as follows:

> A. … Zane Sullivan had been the legal counsel for the Missoula Organization of Relators for decades. He taught at the realtor continuing education…
>
> **Q. Are you aware of whether or not Zane Sullivan works with realtors on transactions?**
>
> A. I would assume he does. He teaches continuing education and had been, like I said, in – in the employ of the Missoula organization of Realtors, and I believe even the state for a number of years, his firm.
>
> **Q. His firm what?**
>
> A. Sullivan Tabaracci & Rhoades, his old firm, was, I guess, who was – who he was with at that point when he was on retain with the state and local realtor association
>
> (R@129, Exh. H)

Mr. Sullivan's opinion on the enforceability of a contract which includes an agreement to agree was summarized in his deposition:

> **Q. What statement did you make to Dawn Maddux?**
>
> A. Dawn Maddux and many other licensees frequently ask me about buy-sell agreements that provide for seller financing, and the question comes up, well, if the buyers -- the sellers and the buyers cannot agree on the terms of the seller financing, where is our transaction. My response is that a buy-sell agreement by itself or seller financing documents is not a locked-in, solid, everything-is-going-to-be-done contract. It is dependent upon the parties reaching an agreement on the seller financing document, so the conversations that I've had with Dawn and others are --…

Q. So your answer is that's no, there's no duty of good faith to not demand unreasonable or clearly unpalatable terms?

A. I would phrase it differently…
I do not believe there's any obligation on a part of parties to a seller-financed transaction to agree to any terms of the documentation being proposed with the exception of an old, old, old Montana Supreme Court case which, as I recall, indicates that there are certain very basic elements to a contract for deed.

R@129, Exh. N)

Likewise, Melbys' own attorney had this understanding. Melby's attorney sent a letter acknowledging that he looked "forward to speaking with [Doerings' attorney] further to keep this transaction moving in the right direction, Melby's attorney was deposed. He testified as follows:

I didn't like the agreement, but my client instructed me to make it work, and so -- and I'm talking about Spencer Melby. He asked me to make as limited revisions as I possibly could live with so that we could make the contract for deed work and keep the transaction alive…
So I called Spencer Melby and I said, "Hey, this is – this contract is -- you know, I got concerns about it." He told me "Make it work." He said, "Do what you got to do to, you know, satisfy your concerns and make it work, 'cause I want -- I – I don't want to lose this property, I don't want to lose this transaction." And so that's what I did.

Later, Melby's attorney testified:

So I did have a conversation with him at that time that, "Hey, you might want to get your financing in order so -- because it doesn't look like this contract for deed is gonna -- we're not gonna be able to negotiate a -- you know, a document that works for everyone."

R@129, Exh. U)

Clearly Doerings' attorney had the same understanding as he terminated the transaction on behalf of the Doerings when a Contract for Deed could not be mutually agreed upon.

Despite the recognition by the parties' attorneys that agreeing to the terms of a Contract for Deed was required to move the transaction forward, the Court disagreed with all of them by determining a mutually agreed Contract for Deed was not a condition precedent to closing the transaction.

CONCLUSION

The District Court erred in granting partial summary judgment to the Melbys on their breach of contract claim. Specifically, the District Court erred in finding that the material terms for the sale of real property were met when only the parties, the subject matter, a description of the property, and the purchase price were agreed upon, but where mutual assent is lacking. Where mutual assent does not exist because terms of a contract for deed cannot be agreed upon, the contract is not enforceable. When the parties failed to agree to the final terms of the Contract for Deed. The parties did not consent to a valid and enforceable contract and the Doerings were entitled to terminate the transaction.

Further, where there was no enforceable contract, the District Court erred in not granting partial summary judgment in favor of the Doerings on the Melbys' breach of contract claim.

Appellants respectfully request this Court to reverse the decision of the District Court, and to remand the case to the District Court with instructions to enter partial summary judgment in favor of the Doerings.

Dated this 22nd day of August 2025.

David B. Cotner
Kyle C. Ryan

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that Appellants' Brief is printed with a proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and the word count calculated by Microsoft Office Word, is not more than 10,000 words, excluding the Certificate of Compliance.

Dated this 22nd day of August 2025.

David B. Cotner

APPENDIX

A. Order Granting Plaintiffs' First Motion for Partial Summary Judgment (Breach of Contract) dated April 29, 2024

B. Buy Sell Agreement and Counteroffer dated February 22, 2021

C. Amendment to Agreement Between Parties for Existing Terms and Conditions dated May 3, 2021

D. Contract for Deed with J.R. Casillas changes dated May 18, 2021

E. Additional Changes to Contract for Deed from J.R. Casillas dated May 21, 2021

F. Email from Del Post to J.R. Casillas with changes to Contract for Deed dated

G. Comparison of Buy Sell Provisions

CERTIFICATE OF SERVICE

I, David Brian Cotner, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-25-2025:

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